Filed 11/17/09 P. v. Dewey CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. BERT DOUGLAS DEWEY, Defendant and Appellant.	H033889 (Santa Clara County Super. Ct. No. EE806714)

Appellant Bert Dewey was charged with one count of possessing child pornography. (Pen. Code, § 311.11, subd. (a).) Appellant entered a plea of guilty, in exchange for an indicated sentence of four years in state prison "top and bottom." On appeal, appellant contends that the trial court violated a "plea agreement" when it imposed a $500 fine pursuant to Penal Code section 290.3.[1] We disagree and affirm the judgment.

[1] Penal Code section 290.3, subdivision (a) provides, "Every person who is convicted of any offense specified in subdivision (c) of Section 290 shall, in addition to any imprisonment or fine, or both, imposed for commission of the underlying offense, be punished by a fine of three hundred dollars ($300) upon the first conviction or a fine of five hundred dollars ($500) upon the second and each subsequent conviction, unless the court determines that the defendant does not have the ability to pay the fine."

Facts and Proceedings Below

The facts underlying appellant's conviction are not in the record. Nor are they pertinent to this appeal.

On September 11, 2008, the Santa Clara County District Attorney filed a complaint in which appellant was charged with one count of possessing child pornography in violation of Penal Code section 311.11, subdivision (a). The complaint contained two allegations: that appellant had a prior strike conviction for endangering or abusing a child with great bodily injury (§ 273a, subd. (a)),[2] and had served a prior prison term within the meaning of section 667.5, subdivision (c).

On December 8, 2008, appellant agreed to enter a guilty plea under the aforementioned conditions. The prosecutor indicated that he wanted a five-year sentence, but the court stated that it was making the offer "based upon the totality of all the circumstances including the relatively early disposition." However, the prosecution agreed not to amend the complaint to add a prior conviction allegation that could have increased appellant's maximum exposure to 13 years. After informing appellant of his constitutional rights, the court told appellant that another judge would sentence him. The court went on, "That judge will be bound by the promises made here today and will be required to sentence you accordingly. If for some reason that judge can't do so, it will be transferred to me or you will be given the opportunity to reinstate a plea of not guilty and fight the case. [¶] Do you understand that?" Appellant confirmed that he understood.[3]

Thereafter, the appellant entered an *Arbuckle* waiver.[4] The court informed appellant that under the terms of the agreement he would not be granted probation, but would be sentenced to state prison with "the stipulated term of four years and that under

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[2] All unspecified section references are to the Penal Code.

[3] Thus, in essence appellant was informed that he could withdraw his plea if the court withdrew its approval of the agreement.

[4] *People v. Arbuckle* (1979) 22 Cal.3d 749.

the two strike law means the mid-term doubled on Count 1." Appellant affirmed that he understood. The court went on to say appellant would "not be given the additional one year state prison for the so-called prison prior." However, appellant would "be ordered to submit to registration requirements of Penal Code Section 290." In addition, the court would order that appellant "pay a restitution fund fine . . . under the formula permitted . . . ." Appellant's counsel confirmed that the amount would be $800. The court told appellant that there would be a parole revocation fine that would be suspended pending his successful completion of parole. Then, the court continued, "There is a $20 court security fee, a criminal justice administration fee of $129. 75. Court could impose general fund fine of up to $10,000 plus penalty assessments but I represent we will not do so. I believe there are some other miscellaneous fees under this particular code section." The prosecutor told the court that he was checking to see if there were any other fines and fees. The court asked appellant "Do you understand that those kinds of orders will be made by the court?" Appellant confirmed that he understood.

Thereafter, the court proceeded to advise appellant regarding his term of parole, his lifetime ban on possessing firearms, that he would have to provide a DNA sample, the potential immigration consequences of his plea, that he would have an additional prison prior on his record and that if charged with a similar offense in the future he could be sentenced to up to 12 years pursuant to section 311.11 subdivision (b). At this point in the proceedings, the prosecutor interjected ". . . I looked at the code and there are no more applicable fees to the 311 charge."

On February 6, 2009, a different judge sentenced appellant. The court imposed the agreed upon prison term. In addition, the court imposed the following fines and fees: a restitution fine of $400 pursuant to section 1203.4, subdivision (b),[5] a court security fee

[5] The court imposed but suspended a parole revocation fine in the same amount pursuant to section 1202.45.

of $20 and a criminal justice administration fee of $129.75. In addition, the court imposed the $500 fine pursuant to section 290.3 (hereafter the sex offender fine). Appellant did not object.

Discussion

Appellant argues that imposition of the $500 fine violated the promises made at entry of the plea, which requires this court strike the fine because the superior court promised that it would not impose a general fund fine.

At the outset, we review the principles that govern plea bargains and indicated sentences in order to establish the proper framework for our analysis.

Negotiated plea agreements are " 'an accepted and integral part of our criminal justice system.' [Citations.] Such agreements benefit the system by promoting speed, economy and finality of judgments. [Citation.]" (*People v. Panizzon* (1996) 13 Cal.4th 68, 79-80.)

As our Supreme Court has instructed, "The process of plea bargaining which has received statutory and judicial authorization as an appropriate method of disposing of criminal prosecutions contemplates an agreement negotiated by the People and the defendant and approved by the court. [Citations.]" (*People v. Orin* (1975) 13 Cal.3d 937, 942.)

Traditionally, courts have viewed plea agreements "using the paradigm of contract law. [Citations.]" (*People v. Nguyen* (1993) 13 Cal.App.4th 114, 120 [waiver of appeal rights].) In so doing, our Supreme Court has said, "When a guilty plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties, including the state, must abide by the terms of the agreement." (*People v. Walker* (1991) 54 Cal.3d 1013, 1024 (*Walker*); accord, *People v. Panizzon*, *supra*, 13 Cal.4th at p. 80.) Accordingly, the state must "keep its word when it offers inducements in exchange for a plea of guilty." (*People v. Mancheno* (1982) 32 Cal.3d 855, 860.)

Additionally, plea agreements have a constitutional dimension. A criminal defendant's constitutional due process right is implicated by the failure to implement a plea bargain according to its terms. (*People v. Mancheno*, *supra*, 32 Cal.3d at p. 860; *Walker*, *supra*, 54 Cal.3d at p. 1024.) However, a defendant may acquiesce in punishment that exceeds the agreed terms of his plea, but his failure to object will not constitute acquiescence if the court taking his plea fails to comply with section 1192.5. (*Walker*,*supra*, at p. 1025.) That statute requires judicial advisement of the defendant's right to withdraw the plea if the sentence imposed is more severe than that called for in the plea bargain.

In analyzing claims of plea bargain violations, courts distinguish between two components of plea taking: advisements and agreement. Each gives rise to a different inquiry, though the two aspects are sometimes confused. With respect to the first facet, the question is whether the court properly advised the defendant concerning plea consequences. With respect to the second facet, the question is whether specific terms or consequences became part of the plea bargain. (See *In re Moser* (1993) 6 Cal.4th 342, 353 [erroneous advisement concerning period of parole]; *People v. McClellan* (1993) 6 Cal.4th 367, 375 [failure to advise concerning sex offender registration requirement].) As the California Supreme Court explained in its seminal decision in *Walker*, the two are "related but distinct legal principles." (*Walker*, *supra*, 54 Cal.3d at p. 1020.)

Generally, while a plea bargain involves negotiation between the People and the defendant, an indicated sentence is a unilateral proposal made by a court with sentencing discretion. (See, e.g., *People v. Superior Court* (*Felmann*) (1976) 59 Cal.App.3d 270, 276.) "In an indicated sentence, a defendant admits all charges, including any special allegations and the trial court informs the defendant what sentence will be imposed. No 'bargaining' is involved because no charges are reduced. [Citations.] In contrast to plea bargains, no prosecutorial consent is required. [Citation.]" (*People v. Allan* (1996) 49 Cal.App.4th 1507, 1516.) Here, the prosecution did not agree to the terms of the plea, the

prosecutor informed the court that he wanted a five-year sentence. However, the prosecution agreed not to amend the complaint to add a prior conviction that could have increased appellant's maximum exposure to 13 years. Accordingly, here we seem to have a kind of hybrid indicated sentence/plea bargain.

Thus, in analyzing the parties' contentions, we adhere to the framework set forth in our Supreme Court's decision in *Walker*, *supra*, 54 Cal.3d 1013, 1019-1020. Accordingly, resolution of the issue presented requires consideration of the aforementioned two related but distinct legal principles. The first principle concerns the necessary advisements whenever a defendant pleads guilty, whether or not the guilty plea is part of the plea bargain. The defendant must be admonished of and waive his constitutional rights. (*Boykin v. Alabama* (1969) 395 U.S. 238 [89 S.Ct. 1709]; *In re Tahl* (1969) 1 Cal.3d 122.) In addition, a defendant must be advised of the direct consequences of the plea. (*Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 605 (*Bunnell*).)

The second principle is that the parties must adhere to the terms of a plea bargain. (*People v. Mancheno*, *supra*, 32 Cal.3d 855, 860.) As our Supreme Court pointed out in *In re Moser, supra,* 6 Cal.4th 342, in " 'any given case, there may be a violation of the advisement requirement, of the plea bargain, or of both. Although these possible violations are related, they must be analyzed separately, for the nature of the rights involved and the consequences of a violation differ substantially. Indeed, much of the confusion engendered by the appellate decisions on this issue results from a blurring of the distinction between these principles.' " (*Id*. at p. 351.)

First, we must determine whether or not the trial court was required to advise appellant concerning the sex offender fine. Second, did the trial court misadvise appellant? Finally, was the sex offender fine a part of the plea agreement?

We reiterate, "In all guilty plea and submission cases the defendant shall be advised of the direct consequences of conviction." (*Bunnell*, *supra*, 13 Cal.3d 592, 605.)

" 'This judicially mandated rule of criminal procedure encompasses only primary and direct consequences of a defendant's impending conviction as contrasted with secondary, indirect or collateral consequences.' [Citation.] The advice requirement generally extends only to 'penal' consequences [citations] [that] are 'involved in the criminal case itself' [citation]. [¶] A consequence is deemed to be 'direct' it if has ' " 'a definite, immediate and largely automatic effect on the range of the defendant's punishment.' " ' [Citation.] Such direct consequences include: the permissible range of punishment provided by statute [citation]; imposition of a restitution fine and restitution to the victim [citation]; probation ineligibility [citation]; the maximum parole period following completion of the prison term [citation]; registration requirements [citation]; and revocation or suspension of the driving privilege [citation]." (*People v. Moore* (1998) 69 Cal.App.4th 626, 630.)

The section 290.3 fine is a mandatory fine in appellant's case (unless the court finds that the defendant does not have the ability to pay)[6] where he was entering a guilty plea to an offense specified in subdivision (c) of section 290. (§ 290.3 [any defendant *shall be punished* by a fine of three hundred dollars ($300) upon the first conviction or a fine of five hundred dollars ($500) upon the second].)[7] Thus, the fine was a direct and penal consequence of appellant's guilty plea and the trial court should have advised him that the fine was mandated. Based on the prosecutor's representations that "there are no more applicable fees to the 311 charge," the court did not advise appellant of the fine.

As our Supreme Court explained in *Walker*, *supra*, 54 Cal.3d 1013, a defendant is entitled to relief based upon a trial court's misadvisement only if the defendant establishes that he or she was prejudiced by the misadvisement, i.e., that the defendant would not have entered the plea of guilty had the trial court given a proper advisement. (*Id.* at pp.

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[6] On a silent record we presume the court found that appellant had the ability to pay. (See, *People v. Clark* (1992) 7 Cal.App.4th 1041, 1050.)

[7] Section 311.11 is listed in section 290, subdivision (c).

1022-1023.) Appellant makes no such claim here. Furthermore, since, contrary to appellant's claim, he was advised that he could reinstate a plea of not guilty if the sentencing judge could not sentence appellant as agreed, by not objecting to the mandatory fine when it was imposed, appellant has forfeited the trial court's error in failing to advise him about the fine. (*Id.* at p. 1029.)

Finally, we turn to the question of whether the sex offender fine was a part of the plea bargain. For reasons that follow, we conclude that it was not.

First, as noted, the sex offender fine challenged in the present case is a statutorily mandated element of punishment imposed upon every defendant convicted of possessing child pornography. (§§ 290, subd. (c), 290.3, subd. (a).) As such it is not a subject of plea negotiations. (See, *In re Moser*, *supra*, 6 Cal.4th at p. 357; *People v. McClellan*, *supra*, 6 Cal.4th at p. 379 [a defendant's rights are not violated if the undisclosed provision is a mandatory part of the punishment for the offense that may not be removed via a plea agreement].)

Second, after defense counsel set out the terms of the agreement—four years in state prison top bottom and the prosecutor's agreement not to amend the complaint to add a prior—the court asked appellant if he understood the agreement. Appellant confirmed that he did. Thereafter, following questioning by the court as to whether appellant had had enough time to consult with his attorney and whether he was entering his plea freely and voluntarily, the court asked appellant if anybody had made any other promises regarding the outcome of the case other "than the promises just stated here on the record . . . ." Appellant responded, "No." Subsequently, the probation officer's report on appellant's case was prepared for the sentencing hearing: the report recommended imposition of the sex offender fine. As noted, when the sex offender fine was imposed appellant did not object.

Based on this record, appellant could not reasonably have understood his negotiated disposition to signify that no sex offender fine would be imposed. (See, *People v. Crandell* (2007) 40 Cal.4th 1301, 1310.)[8]

[8] Furthermore, it appears that appellant's whole argument is based on a misunderstanding of the court's promise not to impose a general fund fine of up to $10,000. When the court told appellant that it would not impose a general fund fine, the court told appellant that the court "could impose" a general fund fine of up to $10,000 plus penalty assessment i.e. the court had the discretion to impose a fine up to $10,000 plus penalty assessments. In fact, what the court was referring to was a general fund fine pursuant to section 672. That section provides "[u]pon a conviction for any crime punishable by imprisonment in any jail or prison, in relation to which no fine is herein prescribed, the court may impose a fine on the offender not exceeding one thousand dollars ($1,000) in cases of misdemeanors or ten thousand dollars ($10,000) in cases of felonies, in addition to the imprisonment prescribed." (§ 672.) However, the court could not have imposed the general fund fine in this case because section 311.11 provides for a fine of not more than $2500. Thus, section 672 was inapplicable. (*People v. Breazell* (2002) 104 Cal.App.4th 298, 304.)

Moreover, appellant asserts that the sex offender fine is a general fund fine. Although the fine is paid into the general fund initially, it is then distributed to the Department of Justice Sexual Habitual Offender Fund, the Department of Justice DNA Testing Fund, to counties that maintain a local DNA testing laboratory and to the Department of Corrections and Rehabilitation to defray the cost of the global positioning system used to monitor sex offender parolees. (§ 290.3, subds. (b)&(d).)

Disposition

The judgment is affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.